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16   UNITED STATES DISTRICT COURT

17   DISTRICT OF NEVADA

18 ORACLE USA, INC., a Colorado   Case No. 2: 10-cv-0106-LRH-PAL
    corporation; ORACLE AMERICA,
19 INC., a Delaware corporation; and   **PLAINTIFFS' NOTICE OF MOTION AND**
    ORACLE INTERNATIONAL   **MOTION AND APPLICATION TO MODIFY**
20 CORPORATRION, a California   **PROTECTIVE ORDER; MEMORANDUM OF**
    corporation,   **POINTS AND AUTHORITIES**
21
              Plaintiffs,
22
          v.
23
    RIMINI STREET, INC., a Nevada
24 corporation; SETH RAVIN, an
    individual
25
              Defendants.
26

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1   **NOTICE OF MOTION AND MOTION**

2 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

3   PLEASE TAKE NOTICE that Plaintiffs Oracle USA, Inc., Oracle America, Inc. and

4 Oracle International Corporation (collectively, "Oracle") do hereby move for a modification of

5 the Stipulated Protective Order, Dkt. 55 (the "Protective Order").

6   This motion is based on the Notice of Motion and Motion, the Memorandum of Points

7 and Authorities, the accompanying Declaration of Chad Russell, the pleadings on file in this

8 action, and on such other matters presented to the Court at the time of any hearing, if any.

9   **RELIEF SOUGHT**

10   Pursuant to Fed. R. Civ. Proc. 26, Oracle seeks a modification of the Protective Order to

11 allow documents and testimony obtained from CedarCrestone, Inc. ("CedarCrestone") in this

12 action to be used, under the same terms of the Protective Order, in litigation between

13 CedarCrestone and Oracle.

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16 DATED: May 14, 2012   BINGHAM McCUTCHEN LLP

17

18   By: */s/ Geoffrey M. Howard*

19   Geoff M. Howard
                                   Attorneys for Plaintiffs

20   Oracle USA, Inc. and Oracle International Corp.

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PLAINTIFFS' MOTION TO MODIFY PROTECTIVE ORDER

1   <u>**MEMORANDUM OF POINTS AND AUTHORITIES**</u>

2   Pursuant to paragraph 19 of the Protective Order, Oracle submits an application to the

3 Court for a modification of the Protective Order by way of this motion.

4 **I.   INTRODUCTION**

5   Oracle seeks limited relief from the Protective Order to allow Oracle to use evidence

6 already obtained from a third party in this case to protect and enforce its intellectual property

7 rights against that same third party in collateral litigation.

8   During fact discovery, Oracle subpoenaed documents from and deposed one of its

9 partners, a company called CedarCrestone. Oracle did so in response to Defendant Rimini

10 Street, Inc.'s ("Rimini") contention that CedarCrestone supported customers in the same way

11 that Rimini does (*e.g.*, using unlicensed local copies of Oracle's software to support multiple

12 customers), which Oracle contends is illegal as to Rimini. Rimini argues that CedarCrestone's

13 conduct is evidence of waiver, industry custom and other theories that excuse Rimini's own

14 infringement. No agreement between Oracle and CedarCrestone would permit CedarCrestone's

15 conduct, if true. Through the discovery now obtained from CedarCrestone in this case, Oracle

16 has concluded that

17

18   . Oracle has attempted to resolve these issues with CedarCrestone, so far without

19 success.

20   The evidence that would support Oracle's claims against CedarCrestone consists of

21 documents (including software code) already produced by CedarCrestone in response to Oracle's

22 subpoena in this action, and related deposition testimony by CedarCrestone's corporate

23 representative. This motion is necessary because CedarCrestone has designated much of that

24 evidence as either "Confidential Information" or "Highly Confidential Information - Attorneys'

25 Eyes Only" pursuant to the Protective Order entered by the Court in this action. This motion

26 does not challenge the appropriateness of CedarCrestone's designation nor is Oracle seeking any

27 additional productions from CedarCrestone. However, the Protective Order prohibits Oracle

28 from using the information that CedarCrestone produced under a confidentiality designation

<div align="center">1</div>

1   other than for "preparation for trial, trial of and/or appeal from this Action and no other." Oracle

2   requested that CedarCrestone voluntarily agree to modify the Protective Order to allow Oracle to

3   enforce its rights against CedarCrestone, but CedarCrestone refused. Accordingly, Oracle now

4   moves to amend the Protective Order to allow the use of these materials in litigation against

5   CedarCrestone. In these circumstances, the law "strongly favors access to discovery materials to

6   meet the needs of parties engaged in collateral litigation." *Foltz v. State Farm Mut. Auto. Ins.*

7   *Co.*, 331 F.3d 1122, 1131 (9th Cir. 2003).

8   II.   **FACTUAL BACKGROUND**

9   A.   **The Protective Order**

10   On May 21, 2010, the Court entered the Protective Order to which the parties had

11   stipulated. Stipulated Protective Order, Dkt. 55. The Protective Order allows non-parties, like

12   CedarCrestone, to designate produced information as "Confidential Information" or "Highly

13   Confidential Information - Attorneys' Eyes Only" without seeking the Court's prior permission.

14   *Id.* at ¶ 2. The Protective Order restricts the use of these designated materials to the "preparation

15   for trial, trial of and/or appeal from this Action and no other." *Id.* at ¶ 8. The receiving party

16   (here, Oracle) may only share materials designated as "Confidential Information" or "Highly

17   Confidential Information - Attorneys' Eyes Only" with individuals in connection with this

18   action.[1] *Id.* at ¶¶ 9, 10, 12. Further, the party receiving information may not file designated

19   materials in the public record without written permission from the party asserting the claim of

20   confidentiality or a court order. *Id.* ¶ 14.

21   B.   **Oracle Obtains Discovery From CedarCrestone**

22   CedarCrestone holds itself out to be ████████████████████████████████

23   ████████████████████████████████. Russell Decl., ¶ 3, Ex. A. Among the services

24   provided by CedarCrestone to its clients are ████████████████████████

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26   ───────────────────────

27   [1] CedarCrestone did waive this provision so that Oracle's counsel could consult with Oracle
    management regarding CedarCrestone's conduct as revealed in discovery and pursue settlement
    discussions with CedarCrestone.

28

PLAINTIFFS' MOTION TO MODIFY PROTECTIVE ORDER

1 ███████████. *Id.*

2   Oracle initially sought discovery from CedarCrestone because Rimini asserted as a

3 defense to Oracle's copyright infringement claims that it is "an industry standard for third party

4 vendors like ... CedarCrestone" to possess copies of Oracle's software and support materials.

5 Rimini's Answer to Oracle's Second Amended Complaint and First Amended Counterclaim,

6 Dkt. 153 at ¶ 15. Rimini also alleges in support of its counterclaims, including for defamation,

7 that "it is common industry practice by other third party consulting vendors such as ...

8 CedarCrestone ... to possess and work with copies of their client's licensed software products."

9 *Id.* at ¶ 54.

10   On February 14, 2011, Oracle subpoenaed CedarCrestone for foundational documents

11 concerning CedarCrestone's business model. Russell Decl., ¶ 4, Ex. B. After protracted

12 negotiations with CedarCrestone, on July 19, 2011, Oracle, Rimini and CedarCrestone entered

13 into a stipulation whereby CedarCrestone agreed to the terms of the Protective Order (the

14 "CedarCrestone Stipulation"). Russell Decl., ¶ 5, Ex. C. Pursuant to the CedarCrestone

15 Stipulation, the parties agreed that the Protective Order would govern materials produced by

16 CedarCrestone in response to discovery requests in this action. *Id.* at preamble. Oracle and

17 Rimini also agreed that in the event that a party to this action filed such materials with the Court,

18 that party would file a corresponding motion to seal and provide notice to CedarCrestone. *Id.* at

19 ¶ 3.

20   CedarCrestone ultimately produced approximately 625 pages of documents and a disk of

21 software materials containing approximately 2.16 GB of files. *Id.* at ¶ 6. CedarCrestone

22 designated most of these materials either "Confidential Information" or "Highly Confidential

23 Information - Attorneys Eyes Only" under the Protective Order. *Id.*

24   After reviewing the documents produced by CedarCrestone, Oracle issued a deposition

25 subpoena to CedarCrestone. On December 1, 2011, Oracle deposed CedarCrestone's 30(b)(6)

26 representative, Paul Simmons. *Id.* at ¶ 7. CedarCrestone has designated all of this deposition,

27 including exhibits used at the deposition which it had previously produced without any

28 confidentiality designation, as "Highly Confidential Information - Attorneys' Eyes Only." *Id.*

3

C.   Oracle Learns That CedarCrestone Is Engaged in Many of the Same Activities As Rimini

The documents and Simmons testimony reveal that ████████████████████████ ████████████████████, including:

- ██. Russell Decl., ¶ 7, Ex. D (Dec. 1, 2011 Deposition of Paul Simmons ("Simmons Dep.")) at 24:23-25:6.

██. *Id.* at 26:11-29:1; 95:19-96:2.

- ██. *Id.* at 29:5-24; 30:22-31:12.

- ██. *Id.* at 70:17-72:18; 74:15-24.

III.   THE COURT SHOULD MODIFY THE PROTECTIVE ORDER

Courts in the Ninth Circuit "strongly favor[] access to discovery materials to meet the needs of parties engaged in collateral litigation." *Foltz*, 331 F.3d at 1131. This preference is supported by the well-founded policy rationale that "[a]llowing the fruits of one litigation to facilitate preparation in other cases advances the interest of judicial economy by avoiding the wasteful duplication of discovery." *Id.* (citing *Bechman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 475 (9th Cir. 1992)). Therefore, requests to modify a protective order to allow the use of discovery in collateral litigation "should generally be granted." *Id.*

Foltz sets out a two-step test. First, the party seeking the modification "must demonstrate

1   the relevance of the protected discovery to the collateral proceedings and its general

2   discoverability therein." *Id.* at 1132. Second, the district court weighs "the countervailing

3   reliance interest of the party opposing modification against the policy of avoiding duplicative

4   discovery." *Id.* Both steps are satisfied here.

5   **A.**   **The CedarCrestone Discovery is Relevant**

6   This Court "should satisfy itself that the protected discovery is sufficiently relevant to the

7   collateral litigation that a substantial amount of duplicative discovery will be avoided by

8   modifying the protective order." *Id.* The relevance determination does not require a ruling by

9   the court in which the collateral litigation will be brought that the discovery in this action would

10   be relevant to the subsequent lawsuit: "No circuits require the collateral litigant to obtain a

11   relevance determination from the court overseeing the collateral litigation prior to requesting the

12   modification of a protective order from the court that issued the order." *Id.* Rather, once the

13   district court makes "only a rough estimate of relevance," the "only issue it determines is

14   whether the protective order will bar ... access to the discovery already conducted." *Id.* at 1132-

15   33.

16   Oracle easily meets this test. As the Court is aware, in this action Oracle alleges that

17   Rimini has infringed Oracle's copyrighted software through its practices of maintaining local

18   copies of its customers' software, sharing environments between customers, developing updates

19   in generic development environments, and indiscriminately downloading. *See, e.g.*, Oracle's

20   Second Amended Complaint for Damages and Injunctive Relief, Dkt. 146 at ¶¶ 5, 9, 40-41, 45,

21   50-51, 58, 77-80, 85-87, 93-96, 119.

22   Through discovery, Oracle has learned that ███████████████████. *See*

23   Section II.C. The evidence obtained from CedarCrestone ████████████ is relevant to

24   any litigation brought by Oracle, to protect its intellectual property, against CedarCrestone.

25   CedarCrestone has produced documents related to PeopleSoft branded software that it maintains

26   on its computer systems, its practices of downloading materials from Oracle's websites, and

27   documents related to its provision of services to its customers. Russell Decl., ¶ 4, Ex. B at ¶¶ 1,

28   2, 4, 8. CedarCrestone's corporate representative testified at length about ████████████

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3   . Simmons Dep. at 24:23-25:6; 26:11-29:24; 30:22-31:12; 70:17-72:18, 74:15-24;

4 95:19-96:2.

5   . By definition, the information thus also

6 overlaps with the discovery that Oracle will seek in any ligation it brings against CedarCrestone

7 for this same conduct. At a minimum, the Court can make the required finding of a "rough

8 estimate of relevance" to justify modifying the protective order. *Foltz*, 331 F.3d at 1132-33.

9   Indeed, in this case Rimini

10   . *See* Defendant Rimini Street Inc.'s Memorandum and Points of Authority in

11 Opposition to Oracle's Motion for Partial Summary Judgment, Dkt. 259 at 16:12-17:11. Rimini

12 also undoubtedly will contend that Oracle has waived its rights (or has singled out Rimini who,

13 unlike CedarCrestone, is not an Oracle partner) if Oracle does not attempt to enforce its rights

14 against CedarCrestone. Having unsuccessfully attempted to resolve its concerns through

15 dialogue with CedarCrestone so far, Oracle must now take legal action against CedarCrestone.

16   Courts in similar circumstances routinely modify protective orders to allow the use of

17 discovery materials in "collateral" proceedings which overlap on either facts, parties, or issues

18 with the litigation in which the protective order was entered. *E.g., Largan Precision Co., Ltd. v.*

19 *Fujinon Corp.*, No. C 10-1318, 2011 WL 1226040, *3-4 (N.D. Cal. March 31, 2011) (modifying

20 protective order to allow plaintiff in patent infringement case to use confidential discovery in

21 litigation against different defendants in a case involving similar claims of patent infringement);

22 *In re Dynamic Random Access Memory Antitrust Litig.*, No. 02-1486, 2008 WL 4191780, *2-3

23 (N.D. Cal. Sept. 10, 2008) (modifying protective order so that the prohibited "use" of discovery

24 materials in California antitrust actions would not prohibit use of those materials by plaintiffs in

25 two securities cases filed in Idaho because "the same illegal price-fixing conspiracy that is at the

26 center of the DRAM MDL litigation [is] squarely at the heart of the collateral action

27 complaints"); *CBS Interactive, Inc. v. Etilize, Inc.*, 257 F.R.D. 195, 205-06 (N.D. Cal. 2009)

28 (modifying protective order to allow plaintiff to use discovery obtained in federal patent

PLAINTIFFS' MOTION TO MODIFY PROTECTIVE ORDER

1   infringement case to prepare to bring trade secret misappropriate claims).

2   **B.   CedarCrestone Has No Reliance Interest That Outweighs The Efficiencies Gained By Modifying The Protective Order**

3
In the second part of the *Foltz* test, the district court weighs "the countervailing reliance

4   interest of the party opposing modification against the policy of avoiding duplicative discovery."

5   *Id.* A blanket protective order results in less reliance "because it is by nature over inclusive." *Id.*

6   (quoting *Beckman*, 966 F.2d at 4575). Mere reliance on a blanket protective order "will not

7   justify a refusal to modify." *Id.*

8
Given that the modification to the Protective Order proposed by Oracle will not impose

9   any additional costs or obligations on CedarCrestone, in that Oracle does not seek to compel

10   further productions from CedarCrestone in this action, CedarCrestone's only grounds to object to

11   the proposed modification is CedarCrestone's reliance interest on the Protective Order.

12   However, CedarCrestone has only a minimal reliance interest in the Protective Order because it

13   is a "blanket" protective order. The Protective Order provides that the producing party may

14   designate discovery materials as "Confidential Information" or "Highly Confidential Information

15   - Attorneys' Eyes Only." It does not require the designating party to file a motion pursuant to

16   Federal Rule of Civil Procedure 26(c) on a document-by-document or line-by-line basis to have

17   the Court determine that the materials is confidential. Protective Order at ¶ 6; *Foltz*, 331 F.3d at

18   1133; *Verizon Cal.*, 214 F.R.D. at 586 (quoting *San Jose Mercury News, Inc. v. U.S.D.C. - N.D.*,

19   187 F.3d 1096, 1103 (9th Cir. 1999) (protective order which allows a party to designate

20   confidentiality without court intervention is akin to a blanket order). Indeed, the "blanket"

21   nature of the Protective Order is evidenced by CedarCrestone's designation of the entirety of its

22   Rule 30(b)(6) witness' deposition as "Highly Confidential Information - Attorneys' Eyes Only."[2]

23   Russell Decl. at ¶¶ 6, 7.

24   _____

25   [2] Among the deposition testimony and exhibits that CedarCrestone has designated as "Highly
26   Confidential Information - Attorneys' Eyes Only" is ███████████████████
     (Simmons Dep. at 16:4-11), ███████████████████ (*id.* at 14:13-22), and ████
27   ███████████████████ (Russell Decl., Ex. E (Plaintiffs'
     Exhibit No. 1300)).

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1   Thus, the Protective Order in this case resembles the ones in *CBS Interactive*, 257 F.R.D.

2   at 200, and *Verizon Cal., Inc. v. Ronald A. Katz Tech. Licensing, L.P.*, 214 F.R.D. 583, 586 (C.D.

3   Cal. 2003). In both cases, as here, the Protective Order allowed the parties to designate certain

4   discovery materials as confidential or highly confidential. Both courts found those to be blanket

5   protective orders under Ninth Circuit law because the parties – not the Court – made the initial

6   confidentiality designations. And, in both cases, the courts found that the reliance interests were

7   too minimal to oppose modification for use of the discovery materials in collateral litigation.

8   *CBS Interacive*, 257 F.R.D. at 206 ("Mere reliance on a blanket protective order does not justify

9   a refusal to modify it when a reasonable request for disclosure has been made."); *Verizon Cal.*,

10   214 F.R.D. at 586.

11   Moreover, the Court easily can accommodate any minimal reliance interest

12   CedarCrestone does have in the secrecy of the information. The Court can modify the Protective

13   Order to include "the same restrictions on use and disclosure contained in the original protective

14   order." *Foltz*, 331 F.3d at 1133 (quoting *United Nuclear Corp.*, 905 F.2d at 1428). Oracle's

15   proposed order granting the present motion does exactly that. The proposed order states: "For

16   purposes of paragraphs 8, 9, 10, 11, 12, and 14 of the May 21, 2010 Stipulated Protective Order,

17   with respect to discovery provided by CedarCrestone, the terms 'this Action' and 'this litigation'

18   shall include litigation between Oracle (and any of its affiliates) and CedarCrestone relating to

19   the discovery produced by CedarCrestone." [Proposed] Order Granting Oracle's Motion to

20   Modify the Protective Order, submitted with this motion. That modification simply alters the

21   permitted uses of the materials obtained from CedarCrestone while preserving all the other

22   restrictions on use and disclosure provided by the Protective Order as it exists now.

23   //

24   //

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1   IV.   CONCLUSION

2   For the foregoing reasons, the Court should modify the Protective Order to allow

3   discovery obtained from CedarCrestone to be used in anticipated litigation between Oracle and

4   CedarCrestone.

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     DATED: May 14, 2012   BINGHAM McCUTCHEN LLP

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8   By: /s/ Geoffrey M. Howard
                                                         Geoffrey M. Howard
9   Attorneys for Plaintiffs
                                                   Oracle USA, Inc. and Oracle International Corp.
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PLAINTIFFS' MOTION TO MODIFY PROTECTIVE ORDER